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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES CHAPMAN, et al.,

Petitioners,

vs.

THE DOW CHEMICAL COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Does an action brought by the plaintiff veterans and their families against the several stateless, multi-national, conglomerate, corporate war contractor defendants to redress the poisoning of approximately 2.4 million American Servicemen[1] who served as combat soldiers during the war in Southeast Asia raise "federal questions" the resolution of which is properly before the federal courts under 28 U.S.C. § 1331 and the determination of which should be governed by some uniform rule of federal common law?

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1 There are additional suits before the District Court brought by Australian and other SEATO soldiers and their families. See 506 F. Supp. 756 (E.D.N.Y. 1980).

PARTIES

More than 100 actions involving over 5,000 individual veterans, their wives, widows and children, and in certain cases their parents, were filed in federal district courts throughout the United States and appear before this Court as consolidated under docket MDL 381 pursuant to 28 U.S.C. § 1407. The lead case, under MDL procedures, is:

> "CHARLES CHAPMAN, individually and on behalf of all those so unfortunate as to have been and now to be similarly situated at risk from the toxic effects of phenoxy herbicides such as the 2, 4, 5 trichloro phenoxy aliphatics manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively by the corporate defendants herein, although known to be contaminated with toxic synthetic organic chemical 2, 3, 7, 8-tetrachloro dibenzo p.-dioxin ("TCDD" or "Dioxin") and KUNIKO CHAPMAN, individually and on behalf of all those so unfortunate as to have been similarly affected as a result of the toxic effects of phenoxy herbicides such as the 2, 4, 5 trichloro phenoxy aliphatics manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively by the corporate defendants herein, although known to be contaminated with toxic synthetic organic chemical 2, 3, 7, 8-tetrachloro dibenzo p.-dioxin ("TCDD" or "Dioxin"),
>
> Plaintiffs,
>
> vs.
>
> THE DOW CHEMICAL COMPANY, HERCULES INCORPORATED, NORTHWEST INDUSTRIES, INC., DIAMOND SHAMROCK CORPORATION, MONSANTO COMPANY, and NORTH AMERICA PHILIPS CORP.,
>
> Defendants,[2]
>
> and
>
> THE UNITED STATES OF AMERICA, VETERANS ADMINISTRATION, DEPARTMENT OF DEFENSE, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
>
> as their several interests may appear."

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2 After the arguments before the Court of Appeals and as a result of disclosures by the government, Ansul Company, Riverdale Chemical Co., Uniroyal, Inc., Occidental Petroleum Co., have been included as additional defendants. Their counsel will be served with copies of this Petition.

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No._____

CHARLES CHAPMAN, et al.,

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THE DOW CHEMICAL COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, veterans of United States military service in Viet Nam, their wives and widows, children, representatives, and survivors, respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Second Circuit in these cases.

OPINIONS BELOW

The opinion of the Second Circuit from which a writ of certiorari is sought is reported at 635 F.2d 987 (2d Cir. 1980). That decision by a divided court, Chief Judge Feinberg dissenting, reversed a decision by the District Court, George C. Pratt, J., reported at 506 F. Supp. 737 (E.D.N.Y. 1979).[3]

3 Subsequent to the decision of the Court of Appeals, the District Court gave limited class certification to those actions which, because of diversity jurisdiction or other reason, were not dismissed as a result of the action of the Court of Appeals. *In Re Agent Orange Product Liability Litigation*, 506 F. Supp. 762, 787 (E.D.N.Y. 1980). There were approximately 800 individuals named plaintiffs at the time of the

JURISDICTION

The decision and order sought to be reviewed was entered by the clerk of the Court of Appeals on November 24, 1980, without time notation. A Petition for Rehearing *en banc* was denied by order entered January 28, 1981. This Petition is being filed within 90 days of that order and no extension of time for filing this Petition has been sought. Jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1331(a) of Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and arises under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

This litigation arises out of the use of phenoxy herbicides, including a certain "Agent Orange," which were manufactured, formulated, advertised, marketed, promoted and sold by the multinational, conglomerate, corporate defendant war contractors. The plaintiffs are the class of all those United States veterans who served in Southeast Asia during the "Viet Nam War" and were exposed to chemical defoliants such as the "dioxin" contaminated phenoxy herbicides, together with their wives and children, and, in certain unfortunate cases, their widows, orphans, and parents.

Court of Appeals decision. Because of the immense burdens being placed on the clerk's office by individual filings, the District Court had requested counsel to refrain from filing further actions, pending class action certification. The District Court designated one case, *Chapman* v. *Dow*, 79 C. 1195 (N.D. Ill., 1979), as lead case for the purposes of these motions.[1]

The phenoxy herbicides supplied by the defendant War Contractor were admittedly contaminated with polychlorinated dibenzo *p*-dio (PCDDs), including 2,3,7,8-tetrachloro-dibenzo *p*-dioxin (TCDD "Dioxin"), a compound conceded to be one of the most toxic substances ever developed by man. As a result of exposure to these contaminated herbicides, individual veterans have suffered genetic and somatic damage, including neoplastic disease (cancer). Children of the plaintiff veterans have been born with catastrophic polygenetic birth defects, while others have died *in utero*, been stillborn, or succumbed as infants.

In addition to compensatory, general and punitive damages the plaintiff veterans demand declaratory judgment and equitable relief including the creation of a trust fund for the benefit of the afflicted victims out of the current earnings of the corporate defendants rather than the public treasury.[4]

Jurisdiction is invoked under 28 U.S.C. § 1331 ("federal question"), because the claims of the more than two million soldier-veterans who fought shoulder-to-shoulder for the United States of America in Southeast Asia by command of the Federal Government should not be subject to the vagaries of disparate state laws and the inevitable inconsistent results which would allow recovery to some and deny it to others solely because of the accident of their residence. Put another way, the plaintiff veterans and their families assert "federal question" jurisdiction because the several states (which cannot agree on principles of substantive tort law, choice of law, or statutes of limitations, and which would readily allow compensation to some and deny it out of hand to others) are inappropriate forums to resolve the fundamentally federal interests determining the relationships between members of the armed forces of the United States and their country.

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4 Such a trust fund is necessary to assure restitution to, among others, the American taxpayers for benefits paid those victims through the United States Department of Health and Welfare, the social services agencies of the several states and the Veterans Administration. The trust fund may also provide the means for the corporate defendants to avoid economic disaster should the plaintiff veterans and their families ever recover damages consistent with the magnitude of their injuries.

REASONS FOR GRANTING THE WRIT

I.

The federal interest in the "Agent Orange" cases mandates "Federal Question" Jurisdiction.

Quite apart form the legal issues raised, the claims of the plaintiff veterans and their families should command the attention of this Court because of the national concern for their plight and the widespread public interest in having the issues of fact aired in the essentially apolitical atmosphere of the federal courts.

In a formal sense, Petitioners contend that there is an acknowledged, direct, and continuing federal interest in the unique relationship between soldiers and their government; and that there is an abiding and deep concern of the American people who want to know how the federal courts are going to deal with the legitimate and substantial claims of these combat veterans.

This Court has already seen fit to review issues of less significance arising out of isolated claims (*Day and Zimmerman, Inc.* v. *Challoner,* 423 U.S. 3 (1975). It would seem all the more appropriate to consider them in the context of a mass toxic tort committed upon more than two million young Americans who answered their country's call to protect American interests in Southeast Asia.

The legal issues are no less substantial and important than the moral and philosophical questions which haunt the nation about the "Vietnam War". The District Court and, it is submitted, even the Court of Appeals, correctly, reviewed the principles of law contained in *Miree* v. *DeKalb County,* 433 U.S. 25 (1977) and *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966) and synthesized the criteria into a three-pronged test to establish whether the Court should assume "fed-

eral question" jurisdiction and whether a federal common law rule should determine the veterans claims:

> ". . . (1) the existence of a substantial federal interest in the outcome of a litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law." 635 F.2d at 990; 506 F. Supp. at 746.

The majority opinion in the Court of Appeals, written by Judge Amalya Lyle Kearse, while disparaging "uniformity" as a basis for federal interest, nonetheless agreed that substantial federal interests existed in the relationship of a soldier to his government [*Feres* v. *United States*, 340 U.S. 135 (1950); *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947)] and, of equal importance, also in the relationship of the government to its war suppliers [*Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977)].

Standard Oil, (supra), recognized that the relationship between the government and its servicemen was "distinctly federal in character," and conferred rights and duries on members of the armed forces of the United States that were distinctly federal in nature. (*Id.* at 305). The Second Circuit acknowledged that "the government has an interest in the welfare of its veterans [who] have given of themselves in the most fundamental way possible in the national interest." 635 F.2d 994.

Similarly, *Stencel Aero Engineering Corp., (supra)*, established that the relationship between the government and those with whom it contracts is also distinctly federal in character. (*Id.* at 672). Liability here, as the Second Circuit observed (635 F.2d at 994), could well affect not only the government's ability to secure military equipment, but also the prices, terms and conditions upon which it could be procured.

Notwithstanding their agreement that the "Agent Orange" cases involve substantial federal interests, Judges Kearse and Van Graafeiland, however, found these interests in conflict and

held that the federal courts were incapable of resolving conflicts between competing federal interests.

The notion that federal courts are unable to, or simply cannot, select a rule of federal common law from among federal policies and interests is not only novel but fundamentally inconsistent with the concept that each citizen has an obligation to serve in the Armed Forces of the United States, but no such obligation to serve in the militias of the several states. Put another way, the plaintiff veterans are soldiers who went to Vietnam not at the behest of any individual state, but by compulsion of the federal government.

While in Vietnam, the plaintiff veterans were exposed to toxic synthetic organic chemicals such as TCDD which contaminated the "Agent Orange" sold to the United States Government by the several stateless, multi-national chemical companies, the defendants in these actions. The plaintiffs can demonstrate that these war contractors failed to take reasonable care to reduce or eliminate the dioxin contaminate in the phenoxy herbicides they manufactured, and that they failed to warn the Department of Defense during the war, and the Veterans Administration after the war, about the dangers associated with the dioxin contamination. Thus, the defendant war contractors sold the federal government a product which was not only defective in both design and manufacture but also lacking the warning necessary to enable the federal government to make an informed choice. If the contaminated phenoxy herbicide was a "defective" product, it was "defective" as to all the American soldiers who were exposed to it in Southeast Asia regardless of the state of their residence at the time they joined the armed forces or the state of their residence today.[5]

Nevertheless, Judges Kearse and Van Graafeiland tell us that soldiers who fought shoulder-to-shoulder and were exposed to this poisonous contaminant, without regard for the states from

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5 The Third Amended Complaint asserts causes of action in Strict Product Liability, Negligence, Breach of Warranty, Intentional Tort, Equity and Nuisance.

which they came, are to be treated in widely disparate fashion according to the law of their home states or by the exercise of some esoteric choice of law principle.

As a practical matter, if the decision of the Court of Appeals is permitted to stand, it means that two judges of the Second Circuit will have closed the door to the Courthouse and barred recovery to more than 600,000 veterans from twenty states, while their comrades in arms from the remaining thirty states will be permitted to recover compensation for the damages they have suffered as a result of the defendants' wrongdoing.

Undoubtedly, the millions of soldiers who heeded the call of their country to serve and fight in the Viet Nam war, who endured untold suffering and made incredible sacrifices in the service of their government, as well as those yet to be called to served our nation in future wars, will find not only anomalous, but incomprehensible and disturbing the notion of Judges Kearse and Van Graafeiland that their right to be heard in a federal court is something less than that of convicted felons (see *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir. 1980), *cert. denied*, 444 U.S. 940 (1979).

In *Standard Oil, (supra)*, this Court found authority to proceed "even though Congress has not acted affirmatively about the specific question." 332 U.S. at 307. *See*, also, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 591 593-94 (1973). Indeed, almost by definition, nearly all of the cases establishing federal common law have proceeded in the absence of particularized legislation.

Evidence of federal concern can be found in legislation which provides for re-employment of returning veterans [38 U.S.C. § 2021 (1976)], and for compensation for a serviceman's death or injury in both peace and wartime [38 U.S.C. § 310 *et seq.* (1976)].[6]

6 The federal fiscal interest in servicemen's welfare is increased by the eligibility of disabled servicemen for supplemental security benefits. 42 U.S.C. § 1381, *et seq.*; *Id.* § 1395, *et seq.*; and *Id.* § 423, *et seq.*

Chief Judge Feinberg's dissent in the Court of Appeals properly pointed out that any "conflict" between federal policies was more apparent than real:

> "The United States has a clear interest in the protection of its soldiers from harm caused by defective war material. What other interests does the United States arguably have that might conflict with this clear interest?" 635 F.2d at 998.

Analyzing that question and considering such matters as the interest of the government in ensuring that its contractors get a fair hearing, the only other interest of the government in the defense contractors he discerned was that they not be driven to bankruptcy by a large verdict, an untoward result clearly within the equity jurisdiction of the federal courts to prevent, and an issue both speculative and remote at the moment.

Hence, Judge Feinberg argued:

> "The conclusion seems inescapable to me that the United States' interest in the 'welfare' of defendants cannot approach, either in magnitude or in quality, its interest in the welfare of the Agent Orange plaintiffs. In short, in the case before us the paramount interests of the United States are in the welfare of its veterans and in their fair and uniform treatment." 635 F.2d at 998.

Even accepting, *arguendo*, their determination that the "Agent Orange" cases create a conflict among federal policies that should properly be resolved by Congress,[7] by this holding, Judges Kearse and Van Graafeiland leave to the fifty states courts with their myriad rules of decision the role which they would assign to Congress. The result of the majority holding is anomalous to its rationale, since the effect of this mandate is to relegate the resolution of competing federal interests to *state law*.

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7 Thus stated, the formulation of the Court of Appeals suffers from one further practical problem: Congress has not acted (if it should), but the case is actually before the courts.

Thus, the majority opinion contains two serious errors which call for correction by this Court:

1. Federal prisoners have more rights than United States soldiers.

2. State courts, but not federal courts, are empowered to "strike the balance between the conflicting interests of the veterans and the contractors, and thereby identify federal policy".

How state law became an appropriate vehicle for the resolution of conflicting federal interests was never explained by the Court of Appeals. However, the notion that the majority decision has relegated all the soldier-veterans and their familes to the inconsistent results of local state laws is itself an illusion. This is so because, according to the defendant war contractors, the claims of all soldier-veterans in at least twenty states will be barred by Statutes of Limitations, so that the ultimate effect of the ruling of Judges Kearse and Van Graafeiland is to close and lock the doors to the courthouses for all time to more than 600,000 veterans and perhaps even to their widows and deformed children.

The fact is that the veterans who petition this Court were called by the federal government of the United States to fight in an unpopular war thousands of miles away from home. While in Southeast Asia, they were exposed to contaminated phenoxy herbicides sold to the federal government by the stateless, multi-national defendant war contractors. It was the federal government that was victimized by the sale. Similarly, it is the federal government that had the non-delegable duty to prevent interference by third parties with its relationship with its soldiers and to protect them (whether conscripts or volunteers) from unnecessary harm. That is the correlative of its right to command their service and their loyalty.

CONCLUSION

Federalism is not an issue. There is no conceivable state interest in the resolution of the claims of the plaintiff veterans and their families against the corporate defendant war contractors that outweighs the interest of the federal government or even seriously contends with it. The question is entirely federal. The Agent Orange litigation arises out of the mass toxic tort committed by a number of stateless, multi-national, conglomerate chemical companies against the more than two million American servicemen and women who served in Southeast Asia from 1962 through 1971.

It is impossible to ignore the unwieldiness and impracticality of utilizing state choice of laws rules to decide the "Agent Orange" cases, in which plaintiffs from each of the fifty states are suing multi-national conglomerate companies incorporated in several states and maintaining principal places of business in still other states. Choice of law doctrine today is heavily tied to state interest analysis and under the rule propounded by Judges Kearse and Van Graafeiland will require that Courts in each of the fifty states attempt to work out a balance of state interests. It requires no profound power of prophecy to realize that such a venture is doomed to failure. By abdicating jurisdiction of the "Agent Orange" cases as a "federal question," and turning them over to state law, substantial federal interests will be subjected to an irrational mix of choice of law decisions resembling not so much "choice" as chance: a national "choice-of-law" lottery. If this be the price of federalism, then the Viet Nam combat veterans are entitled to know why they have been singled out and compelled to pay so high a price.

The plaintiff veterans were conscripted from all the fifty states of this Union to serve in Southeast Asia. They were in Vietnam by federal command. The deadly dioxin which contaminated the phenoxy herbicides manufactured by the defendants was shipped to Vietnam under government contract.

They were poisoned by phenoxy herbicides contaminated with 2,3,7,8-tetrachloro dibenzo *p*-dioxin (TCDD or "Dioxin")—one of the most toxic poisons ever created by man.

Thousands of these soldiers—now veterans—are suffering and dying. Many have cancer, while others are the fathers of horribly deformed children.

The "Agent Orange" cases are as federal as the United States Constitution. Their genesis is the Viet Nam war, a federal military expedition made possible only by Article I, Section 8, of the United States Constitution and a host of federal statutes governing military operations and defense production; statutes which enable the federal government to raise and support armies, regulate the land, naval, and air forces, and to provide for the common defense of this nation. All of which powers are exclusively reserved to the federal government, not to individual states.[8]

The outcome of the Agent Orange litigation is important to the national defense and security.

The problems raised by the "Agent Orange" cases are of international concern, multi-state in dimension, and uniquely federal in character.

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8 The authority for federal common law jurisdiction in this case is twofold. Article 1, Section 8 of the Constitution gives Congress the power to establish and maintain a military. The ability to make laws concerning the protection of servicemen is a necessary adjunct of this power:

> "For, as the Federal Government has the exclusive power to establish and define the relationship [between itself and its soldiers] by virtue of its military and other powers, equally clearly it has power in execution of the same function to protect the relationship once formed from harms inflicted by others." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 306 (1947).

Similarly, the power to execute jurisdiction at all in cases imbued with the federal interest implies the authority to fashion rules of decision appropriate to that function. The application of state law so displaces legitimate federal interests that the right to employ federal law is necessarily granted.

The decision of this Court will define the rights, duties, and, inevitably, alter the future course of the lives of more than two million young Americans who gave their oath, and in some cases their lives, in defense of this nation.

A decision of this Court that the "Agent Orange" cases are indeed "federal questions" will assure that a uniform standard of liability and duty of care will affect war contractors wherever they design and produce war materiel, and wherever that materiel may be used.

"Federal question" jurisdiction will define the duty of a war contractor to warn the government of the risks associated with the use of chemical products supplied under government contracts.

The complex issues of plaintiffs' rights and defendants' liability cannot be left for determination to the vagaries and uncertainties of state tort law and local choice of law rules. The interstate "choice-of-law" system cannot resolve problems or issues which are inherently federal in nature.

Where millions of soldiers were exposed to an unsafe weapon of war and sustained serious, permanent, and irreparable injuries; and where thousands of those soldiers now carry within their bodies, like a ticking, toxic time-bomb, the cells which may break out into virulently malignant, rapidly metastasizing neoplastic disease or be visited upon their children as catastrophic polygenetic birth defects, then indeed the plight of the plaintiff veterans and their families becomes a matter of singular Federal interest.

A government, moreover, cannot think of safe equipment in terms of the battle it is about to wage, but of those battles yet to be fought in conflicts not yet joined. The continuing interest on the part of the Federal Government in equipment safety—past, present, and future—lies at the very heart of its ability to raise an army and secure and defend its people.

Indeed, so compelling is the federal interest in the "Agent Orange" cases that if there were no established doctrine of

federal common law, this case would demand that it be fashioned and enunciated by the Courts.

Wherefore, the plaintiff veterans and their families pray that this court grant their petition for certiorari to the Second Circuit Court of Appeals United States Supreme Court all together with such other and further relief as to this Court shall seem just and proper under the circumstances.

Respectfully submitted,

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Opinion of the District Court
Dated November 20,1979

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MDL NO. 381 (ALL CASES)

IN RE

"AGENT ORANGE"

PRODUCT LIABILITY LITIGATION

Claiming to be the harbinger of thousands of similar claims, plaintiff veterans and members of their families seek relief because of injuries claimed to have been sustained from use by the military in Vietnam of "Agent Orange", a defoliant chemical referred to for convenience as 2, 4, 5-T, which defendants manufactured and sold to the government.

For the second time in the nine month history of this MDL litigation, lead counsel for plaintiffs[1] has filed a re-amended complaint after oral argument on defendants' motion to dismiss a prior amended complaint. While properly criticizing plaintiffs' disregard for the filing requirements of the Federal Rules of Civil Procedure, all defendants indicate, by letter dated October 23, 1979, that they are "prepared to accept service of the TAVC [third amended verified complaint] in *Chapman v. Dow, et al,* * * *." Furthermore, defendants have signed a consent to the TAVC and agreed that:

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1 Not intended to be included in the term "plaintiffs" are those in any case filed on or after October 3, 1979 or in *Kahler v. Dow*, 79 C 922.

> [T]o avoid further delay arising from the necessity for a new motion addressed to the TAVC, we would ask the Court to deem our motion with respect to the SAVC [second amended verified complaint] as having been made with respect to the TAVC. We do not contemplate, however, that any further briefing will be required with respect to our motion.

Accordingly, defendants' motion to dismiss or strike the SAVC in whole or in part, a motion argued to the court on October 3, 1979, is deemed directed against the TAVC filed October 22, 1979. For reasons set forth below, defendants' motion to dismiss for lack of subject matter jurisdiction is denied, as is defendants' motion to dismiss or strike various allegations of the complaint.

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The TAVC alleges two bases for jurisdiction: (1) the "equitable jurisdiction" of the federal courts; and (2) "federal question" jurisdiction under 28 USC § 1331.

The first basis is without merit. Federal courts have no independent "equity jurisdiction"; they may grant equitable relief, but not unless there is an independent statutory basis for federal jurisdiction, which is conferred only by specific congressional enactment. *See* 7 Moore, *Federal Practice*, ¶ 65.03[2.] (1979).

The second basis, federal question jurisdiction under 28 USC § 1331, is alleged to arise under "the common law and/or the statutory laws of the United States of America." The court will first consider whether a private cause of action may be implied from statutory law, and then will turn to plaintiffs' claims under federal common law.

Implied Causes of Action Under Federal Statutes

The TAVC lists four statutes "from which a cause of action can be implied": the Federal Insecticide, Fungicide and Roden-

ticide Act (FIFRA), 7 USC §§ 135-135k; the Federal Environmental Pesticide Control Act (FEPCA), 7 USC §§ 136-136y; the Toxic Substances Control Act (TOSCA), 15 USC §§ 2601 *et seq.*; and the Consumer Product Safety Act (CPSA), 15 USC §§ 2051 *et seq.*

The federal statute regulating herbicides, including defoliants such as 2, 4, 5-T, is FIFRA. Before 1972, FIFRA regulated "economic poisons", which were defined to include: "any substance or mixture of substances intended for use as a plant regulator, defoliant, or dessicant." 7 USC § 135(a)(2). In 1972, Congress amended FIFRA by enacting the Federal Environmental Pesticide Control Act (FEPCA).[2] FEPCA regulates "pesticides", which are similarly defined to include "any substance or mixture of substances intended for use as a plant regulator, defoliant, or dessicant * * *." 7 USC § 136(u). Thus, FIFRA, as amended by FEPCA, treats defoliants as "pesticides", which has led the parties to refer to 2, 4, 5-T as a pesticide, and leads the court to do likewise, although common usage would undoubtedly categorize 2, 4, 5-T and other defoliants as herbicides, not pesticides.

Because of FIFRA, the other two statutes under which plaintiffs ask the court to imply a private right of action, TOSCA and CPSA, are inapplicable to this litigation. TOSCA, enacted in 1977, regulates "chemical substances". However, "Such term does not include * * * any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed or distributed in commerce for use as a pesticide * * *." 15 USC § 2602(2)(B)(ii). CPSA, enacted in 1976, regulates, "consumer products". However, "such term does not include * * * pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act) * * *." 15 USC § 2052(a)(1)(D). TOSCA and CPSA clearly exclude FIFRA pesticides from coverage. Since FIFRA pesiticides include

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2 Plaintiffs incorrectly treat FEPCA as a statute separate and apart from FIFRA. As stated in the text, FEPCA is an amendment to FIFRA, and thus is properly cited under the statute (FIFRA) which it amends.

defoliants such as 2, 4, 5-T, TOSCA and CPSA are patently inapplicable to this case.

This leaves plaintiffs with only FIFRA, as amended by FEPCA, on which to base an implied private right of action. Plaintiffs' argument is set forth succinctly in their memorandum opposing defendants' motion to dismiss (plaintiffs' memorandum):

> While federal pesticide legislation [*viz.* FIFRA] does not specifically provide civil remedies for the plaintiff veterans and their families, nevertheless, it is manifest that such laws establish regulatory schemes within the context of which it is intended that a remedy be fashioned by the Courts.
>
> Plaintiffs' memorandum at 22.

Plaintiffs cite no legislative history and offer no detailed statutory interpretation to support their argument, resting instead on the "legislative purpose" and "broad federal policy" said to underlie federal legislation concerned with toxic chemicals.

The test for implying a private cause of action under a federal statute is set forth in the leading case of *Cort v. Ash*, 422 US 66 (1975):

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," [citation omitted, emphasis supplied by the Supreme Court] that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? [citation omitted]. Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [citations omitted]. And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?
>
> *Id.* at 78.

Here, the plaintiffs qualify under the first part of the *Cort v. Ash* test, as persons meant to be protected by FIFRA. However, plaintiffs fail the next part of the test, since there is clear indication that Congress intended not to allow suits by private citizens under FIFRA:

> While it is true that nowhere on the face of the statute is it stated that the enforcement powers of the administrator of the EPA or the Attorney General are or should be exclusive, the legislative history of the statute in question clearly indicates that Congress considered and rejected on more than one occasion proposed amendments which would have provided for citizens' civil actions to enjoin violations. * * *
>
> We recognize that changes in a statute in the course of enactment must be observed with caution in determining legislative intent. However, rejection of specific provisions is in our view more significant, may be properly considered and is more persuasive in the circumstances here found. [citations omitted]. Thus, the Congressional intent to us at least is clear enough: Enforcement of FIFRA is reserved by Congress to the Environmental Protection Agency and to the Office of the Attorney General, and violations thereof are not the proper subject of civil actions by citizens.
>
> *People For Environmental Progress v. Leisz*, 373 F Supp 589, 592 (CD Cal 1974)

See also Kelly v. Butz, 404 F Supp 925 (WD Mich 1975), upholding the standing of a state attorney general to bring suit under FIFRA, but noting that "the Court is convinced from its review of the authorities that there are significant manifestations of a legislative intent to exclude suits by private citizens under the statute." *Id.* at 940.

Recognizing the force of these cases, plaintiffs would distinguish them away:

> Each of these cases was properly brought in the Federal District Court because of its jurisdiction over enforcement

> of the federal pesticide laws. The fact that the courts denied the plaintiffs therein standing to enforce the provisions of those laws is immaterial here, because in none of these cases was there a claim similar to that brought by the plaintiff veterans and their families in this case. The "Agent Orange" cases are unique on their facts and hopefully, as was the case with thalidomide, not likely to occur again.
>
> Plaintiff's memorandum at 23.

Plaintiffs' argument reduces to a claim that the large number of potential claims and the unique circumstances surrounding this litigation justify implying a private cause of action under federal pesticide legislation. But the number of claims and the nature of the injuries, unique as they may be, are not proper factors to be considered under the *Cort v. Ash* test, which focuses on Congressional intent and displacement of state law.

Moreover, under each of the federal pesticide statutes, Congress provided explicitly for suits by the EPA administrator to protect the public interest. The circumstances underlying the instant litigation, involving large numbers of claims arising from widespread exposure to toxic chemicals, seem more likely to generate a suit by public officials, such as the EPA administrator, and thus, if anything, present a less compelling case for implying private causes of action than smaller cases involving fewer plaintiffs and more limited exposure. The court concludes that a private cause of action should not be read into FIFRA, or any other toxic chemical statute, and that plaintiffs' claims asserted thereunder must be dismissed.[3]

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3 *Gonzalez v. Virginia-Carolina Chemical Co.*, 239 F Supp 567 (EDSC 1965), a case relied on by plaintiffs, is not to the contrary. *Gonzalez* was a diversity case involving negligence claims against a pesticide manufacturer. The *Gonzalez* court held that defendant, by failing to attach proper labels, had violated the terms of FIFRA, and thus was negligent *per se* under South Carolina law. *Gonzalez* did not suggest, much less hold, that plaintiff had a cause of action directly under FIFRA, itself, which would independently support federal jurisdiction.

Jurisdiction Under Federal Common Law

Paragraph 3 of the TAVC alleges that "the corporate defendants have violated the common law * * * of the United States * * *." Recognizing that application of federal common law is the exception rather than the rule, plaintiffs' memorandum sets forth in some detail the argument for applying federal common law in this litigation.

According to plaintiffs, the governing standard is that of *Clearfield Trust Co. v. United States*, 318 US 363 (1943), which according to plaintiffs applies federal common law:

> 1. Where the question at bar is one arising from or bearing upon a federal program or affecting a federal interest;
>
> 2. Where a federal interest would be subjected to uncertainty by application of disparate state rules; or
>
> 3. Where federal interests can best be effectuated by the adoption of a uniform federal rule.
>
> Plaintiffs' memorandum at 8.

To satisfy the first prong of the *Clearfield* standard, plaintiffs, relying on *United States v. Standard Oil Co.*, 332 US 301 (1974), argue that:

> Since the claims of the plaintiff veterans and their families arise out of the defendants' activities in that significant federal enterprise known as the Viet Nam war, it is hard to conceive of any claim which more clearly involves substantial federal interest and which more clearly satisfies the jurisdiction requirement of 28 U.S.C. § 1331(a).
>
> Plaintiffs' memorandum at 9-10.

Plaintiffs note that the outcome of this litigation may affect claims for "service-related" benefits from the Veterans Administration. Plaintiffs add that federal interests are implicated because "the corporate defendants acted as war contractors to the U.S. government pursuant to federal procurement laws administered by the Department of Defense." Plaintiffs' memorandum at 10.

To satisfy the second prong of the *Clearfield* standard, plaintiffs note that the states have different statutes of limitations, and different rules governing liability for defective products, differences which might "lead to contrary and even contradictory results among the individual cases", a result deemed "intolerable" by *Clearfield*. Plaintiffs' memorandum at 13.

To satisfy the third and final prong of the *Clearfield* standard, plaintiffs list various questions presented by this litigation which should, they say, be governed by a uniform federal rule:

> How are soldiers of the United States to be compensated for toxic torts inflicted by multi-national conglomerate corporations? How are principles of "fitness" and "safety" to be applied to the paraphernalia of the battle field? In the absence of statutory direction, how are the policies enunciated in federal pesticide and toxic substances legislation to be effectuated?
>
> Plaintiffs' memorandum at 15.

According to plaintiffs, each of these questions implicates federal interests, and should be answered under uniform federal standards.

Defendants disagree. To begin, defendants dispute the applicability of *Clearfield*, which sets forth the standard for applying federal common law only when the United States is a party to the litigation. Here, the government is not a party, and defendants insist that the governing rule is supplied instead by other cases, such as *Miree v. DeKalb County*, 433 US 25 (1977) and *Wallis v. Pan American Petroleum Corp.*, 384 US 63 (1966).

Defendants further contend that, even if *Clearfield* governs, plaintiffs fail to meet any of its three standards. First, according to defendants, "no federal interest will be impaired by the application of state law to what are, in essence, claims for personal injury." Defendants' reply memorandum at 2. Although the litigation does involve soldiers and war contractors,

> Claims for personal injury by American servicemen against manufacturers that allegedly harmed them by selling defective products to the military have, in the past, been governed by state law. *See e.g., Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961); *Adams v. General Dynamics Corp.*, 405 F. Supp. 1020 (ND Cal 1975), *affirmed*, 535 F.2d 489 (9th Cir. 1976).
>
> *Id.* at 3.

As for the alleged federal interest in compensating injured soldiers, defendants urge that "there already exists a statutory scheme that is designed to accomplish just this result. *See* 38 USC §§ 310 *et seq.*" *Id.* at 3-4. And the rights and liabilities of the United States, itself, are not directly involved in this litigation, since plaintiffs "have chosen not to bring this action against the United States." *Id.* at 4. Thus, according to defendants, plaintiffs have failed to carry their burden of showing a substantial federal interest involved in this litigation.

Furthermore, according to defendants, plaintiffs fail to show that this litigation will affect "a federal program" concerned with regulation of toxic substances. Even if disparate state laws were applied, "differing judgments rendered on plaintiffs' damage claims because of supposedly differing state tort laws [footnote omitted] will simply have no effect upon the outcome of the EPA's administration of the present version of FIFRA." Defendants' reply memorandum at 7.

Finally, defendants argue that the failure of plaintiffs to show how this litigation would impair a federal interest or a federal program disposes of the second and third branches of the *Clearfield* test, since no federal interest "would be subjected to uncertainty by application of disparate state rules" or would "best be effectuated by the adoption of a uniform federal rule." Thus, defendants urge, plaintiffs have failed in every respect to justify application of federal common law to this litigation.

There is merit to many of defendants' contentions. The test for applying federal common law in suits between private

parties is that of *Miree* and *Wallis*, not *Clearfield*; under *Miree* and *Wallis*, suits by soldiers against war contractors do not necessarily implicate federal programs or substantial federal interests; and the federal interest in compensating soldiers for service-related injuries is the object of an existing statutory scheme, 38 USC §§ 310 *et seq*. However, for reasons discussed below, the court concludes that this litigation does, nonetheless, affect substantial federal interests, and that federal common law must be applied.

Analysis must begin with *Miree v. DeKalb County*, 433 US 25 (1977), in which the Supreme Court explained the limited grounds for applying federal common law in a suit between private parties. *Miree* was a diversity suit with plaintiffs seeking recovery under state law as third party beneficiaries to a contract between defendant and the Federal Aviation Administration (FAA). After its panel applied state laws, the Fifth Circuit *en banc* reversed, finding that a third party beneficiary's right to sue should be determined under federal common law. The Supreme Court reversed once again, concluding that state law, not federal common law, applied.

Writing for the Court, Mr. Justice Rehnquist began by noting that the United States was not a party to the suit, and that "the resolution of petitioner's breach of contract claim against respondent will have no direct effect upon the United States or its treasury." 433 US at 29. For this reason, the solicitor general waived his right to participate in the appeal.

Not only was there no direct federal financial interest, but there was also no federal program threatened by the litigation:

> The operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude. However, we see no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts. Since only the rights of private litigants are at issue here, we find the *Clearfield* trust rationale inapplicable.
>
> *Id.* at 30.

The court quoted from an earlier case, *Wallis v. Pan American Petroleum Corp.*, 384 US 63, 68 (1966), which had discussed "the nature of a federal interest sufficient to bring forth the application of federal common law":

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.* It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress.
>
> *Miree* at 31-32 (emphasis added by the Supreme Court).

The *Miree* court concluded that with respect to an airplane crash caused by birds flying over a dump established near an airport in violation of an agreement with the Federal Aviation Administration, there was no significant conflict between federal policy and state law, and that "any federal interest in the outcome of the question before us 'is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.' [citation omitted]". *Id.* at 32-33.

Scrutiny of *Miree* reveals several different formulations of the standard that governs application of federal common law in a suit between private parties having "no direct effect upon the United States or its treasury". Federal common law might be applied when federal programs or operations "would be burdened or subjected to uncertainty by variant state-law interpretations", 433 US at 30; or when there is "a significant conflict between some federal policy or interest and the use of state law in the premises", *id.* at 31, quoting *Wallis;* or when "substantial rights or duties of the United States hinge on [the suit's] outcome." *Id.* And in his concurrence, Chief Justice Burger suggests that federal common law might be applied:

> where the rights and obligations of private parties are so dependent on a specific exercise of Congressional regula-

> tory power that "the Constitution or acts of Congress 'require' otherwise than that state law govern of its own force." [citation omitted].
>
> Once it has been determined that it would be inappropriate to apply state law and that federal law must govern, "the inevitable incompleteness presented by all legislation means that interstitial federal law making is a basic responsibility of the federal courts." [citation omitted].
>
> *Id.* at 34-35.

Thus, *Miree* formulates in various ways the standard that governs application of federal common law. One point, however, is clear: federal common law is to be the exception not the rule, and the question of "whether to displace state law * * * is primarily a decision for Congress." *Id.* at 32.

Analyzing the law after *Miree*, the Fifth Circuit has provided a helpful synthesis of the principles governing application of federal common law developed in Supreme Court cases:

> Together these cases produce a balancing test. *See generally* Comment, "Adopting State Law As The Federal Rule of Decision: A Proposed Test," 43 U. Chi. L.Rev. 799 (1976). On one side is the federal interest in carrying out a program in the most efficient and effective manner possible. On the other is a state's interest in the preservation of its control over local interests, particularly traditional interests such as family law and real property transactions, and in preventing displacement of state law. Of course, the ultimate goal of the creation of federal law by the courts is to carry out the federal program in question. [citations omitted]. Thus, if state law would actually frustrate rather than only hinder a federal program, federal common law *must* be applied regardless of state interests [citation omitted]. On the other hand, the Supreme Court has demonstrated a growing desire to minimize displacement of state law. *See Miree v. DeKalb County, [supra]*.
>
> *Georgia Power Co. v. 54.20 Acres of Land*, 563 F2d 1178, 1189 (CA5),*cert. denied* —US—, 99 SCt 1213 (Feb. 21, 1979).

As is clear from the Fifth Circuit's analysis and from the Supreme Court cases discussed above, courts have not yet developed a precise standard to govern application of federal common law in suits between private parties. However, the precedents and the parties seem to agree that at least three factors are crucial to applicability of federal common law under any test: (1) the existence of a substantial federal interest in the outcome of a litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law. Accordingly, the court will consider how each of these factors might affect the application of federal common law in this litigation.

Federal Interests

There are substantial federal interests at stake in these lawsuits. As pointed out in *United States v. Standard Oil Co.*, 332 US 301, 305-306 (1947):

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or non-federal governmental agencies, the scope, nature, legal incidence and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority [citations omitted]. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers [footnote omitted] equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others. [footnote omitted].

Soldiers serving in the armed forces are government charges, entitled to government protection. Torts committed by war

contractors against soldiers in action constitute "harms inflicted" on the soldiers and "interference" with the relationship between soldiers and the government. Such harms and interferences implicate federal interests identified in *Standard Oil*.

Defendants argue that 38 USC § 310 *et seq.* gives sufficient federal protection to veterans injured in active service. However, 38 USC § 310 *et seq.*, insofar as it may apply,[4] furnishes limited monthly benefits which may not fully compensate plaintiffs for the serious injuries alleged in the complaint. Nor does 38 USC § 310 *et seq.* provide compensation to veteran's spouses, or their children who are alleged to have suffered genetic damage due to defendants' activities. The limited nature of compensation provided by 38 USC § 310 *et seq.* makes it an insufficient guardian of the rights at stake in this litigation, *viz.* the rights of soldiers to be protected from "harms inflicted by others" and to be compensated for harms already inflicted. The existence and extent of these contested rights necessarily are intertwined with the relationship between government and soldier and thereby implicate federal interests.

Nor is the federal interest in this litigation confined to the rights of soldiers; it includes as well the rights of the war contractors. The government has an interest in the liability of war contractors to soldiers, since the extent of a contractor's liability may, undoubtedly will, affect future dealings between the contractor and the government. In *Miree*, the Supreme Court discounted the effect that third-party suits might have on relations between the FAA and its contractors:

> [W]e see no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts.
>
> 433 US at 30.

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4 38 USC § 310 *et seq.* compensates for service-related injuries. Whether Agent Orange injuries are service-related appears to be the subject of separate litigation. *White v. Cleland*, Civil Action No. 79-1426 (DDC, filed May 31, 1979).

However, suits by civilian third-party beneficiaries to FAA contracts with municipalities for injuries received in a private plane crash are quite different from product liability suits by soldiers against government war contractors for injuries received while serving in the armed forces. FAA relations with municipalities would be only slightly disrupted by sporadic third party suits seeking to enforce diverse contractual provisions. In contrast, government relations with war contractors might well be drastically altered by changes in the rules governing liability of war contractors to soldiers for injuries caused by inherently "dangerous" war materials.[5]

This does not mean that there is a *substantial* federal interest in every product liability suit brought by a veteran against a government war contractor. A lone veteran suing the supplier of a single piece of defective military machinery would implicate only a minimal federal interest. Such were the facts in *Whitaker v. Harvell-Kilgore Corp., supra; Boeing Airplane Co. v. Brown, supra;* and *Adams v. General Dynamics Corp., supra,* cases cited by defendants in each of which state law was

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5 Speculative federal interests in the obligations of war contractors are numerous. War contractors might be expected to increase the price of war materials to correspond to any extension in their potential liability. Such adjustments might have a significant effect on the federal treasury. If potential liability increased dramatically, future war contractors might attach conditions to the use of their products, or balk at supplying the military with any products whatsoever. Thus, the government's military capabilities might be affected by this litigation. Finally, the importance of large government war contractors to the national economy might implicate a federal interest. Defendants are five of the nation's largest chemical manufacturers, facing aggregate claims which may eventually amount to billions of dollars. Defendants note that:

> plaintiffs do not have the temerity to argue that the aggregate claims of the purported class exceed the total assets of the five named defendants. Such an argument would be ludicrous on its face.
>
> Dow's Memorandum in Opposition to Class Certification at 20.

But, with such large corporations, the sudden onset of substantial liabilities, even if they fell far short of defendants' total assets, might well affect federal interests, as shown by the recent events involving the federal government and the Chrysler Corporation.

applied to a tort claim brought by a veteran against the supplier of explosives or airplanes. But this litigation, in contrast, involves suits by many veterans against five war contractors who supplied a product used for some nine years in military operations across large portions of Vietnam. The estimated number of involved veterans ranges from thousands to millions, and the estimated potential liability of the five war contractors ranges from millions to billions of dollars. As the number of veterans and the size of the claims against the war contractors increase so the federal interest in this litigation expands.[6]

Effect on Federal Interests Should State Law Be Applied

If this litigation were governed by state law, different state laws would be applied to essentially similar claims by Vietnam veterans and their families against the five defendant war contractors. As plaintiffs' remark,

> There is, of course, no uniformity of product liability law throughout the 50 states absent this Court's application of the federal common law. Were the corporate defendants to have their way, each of the plaintiffs would be relegated to some local notion of "products liability". Necessarily, this would lead to contrary and even contradictory results among the individual cases. In the end, a granting of defendants' Motion would lead to the spectre of young servicemen who fought a difficult war shoulder-to-shoulder and who were exposed to virtually identical risks coming home to widely varying systems of compensation for their injuries under different systems of jurisprudence

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6 The number of veterans and the size of their claims involved in this litigation implicate substantial federal interests in the rights of veterans. However, the unprecedented number and size of the claims also suggest more speculative, but nonetheless vital, federal interests. The number of veterans potentially involved in this litigation may suffice to raise broad questions about the conduct of military operations which a single veteran plaintiff might not have standing to raise. The resolution, and indeed the cognizability, of such questions implicate significant federal interests, to say the least.

> and before disparate forums. Such a result was deemed intolerable in *Clearfield Trust Co. v. United States* and in *United States v. Standard Oil Co.* and it should be deemed intolerable in the "Agent Orange" cases.
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> Plaintiffs' memorandum at 13.

Application of varying state laws would burden federal interests by creating uncertainty as to the rights of both veterans and war contractors. It would also be unfair in that essentially similar claims, involving veterans and war contractors identically situated in all relevant respects, would be treated differently under different state laws. An extreme example would be the application of different state statutes of limitation to claims by veterans who were injured together in Vietnam, but who lived in different states before or after service. The court concludes that application of state law in this litigation would burden substantial federal interests.[7]

Effect on State Interests Should State Law Be Displaced By Federal Common Law

As noted by the Fifth Circuit in *Georgia Power Co. v. 54.20 Acres of Land, supra*, 563 F2d at 1189, "[T]he Supreme Court has demonstrated a growing desire to minimize displacement of state law." This desire is evident in *Miree v. DeKalb, supra*, 433 US at 32, where the Supreme Court emphasized that "the issue of whether to displace state law on an issue such as this is primarily a decision for Congress." The courts have been especially reluctant to apply federal common law to matters of essentially local concern that are usually governed by well-developed principles of state law. Tort claims are traditionally

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7 It might also be argued that unequal treatment of plaintiff veterans implicates peculiarly federal interests, and unequal treatment of any person, of course, raises questions of justice to which federal courts are sensitive. Presumably, state courts are equally sensitive to claims of inequality and unfairness, but their viewpoints are localized, not national. However, it is the identity of the parties (veterans and war contractors), not merely their numbers, which makes equality of treatment a peculiarly federal concern in this litigation.

matters for state law, which has developed comprehensive substantive and procedural rules to govern them. According to defendants, it would be improper to hold in this litigation "that state law be displaced by an unprecedented federal common law of products liability * * *." Defendants' reply memorandum at 2.

But negligence and strict product liability claims in this litigation do not fall under the developed body of state tort law.[8] State tort law has not yet evolved rules to govern the duties of federal war contractors to federal soldiers. True, state law has been occasionally applied to claims by veterans against war contractors. *Whitaker v. Harvell-Kilgore Corp.*, *Boeing Airplane Co. v. Brown*, and *Adams v. General Dynamics Corp.*, *supra*. But those suits were by individual soldiers and dealt with claims of manufacturing defects in airplanes and explosives, objectives whose misuse is frequently regulated by state tort law. In contrast, this litigation involves defoliants and other toxic chemicals, whose use and misuse is increasingly governed by federal law; comprehensive federal legislation has in large part taken these products out of the domain of state regulation; injuries to large numbers of veterans are claimed to have been incurred while overseas in a combat area; and the injuries themselves are claimed to be an inevitable consequence of the federal government's use of defendants' products.

In sum, state law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad. Because state law is no more or less developed as to such claims than federal common law, application of federal common law thereto would not significantly displace state law.

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8 The TAVC alleges causes of action not only in negligence and strict product liability, but under theories of breach of warranty, intentional tort, equity, and nuisance. Because the focus of the litigation appears to be negligence and strict product liability, only these claims have been considered for application of federal common law. At this point, it is unnecessary to decide whether the other claims should be governed by federal common law, or rather should be treated as pendent state law claims.

It appears, then, that there are significant federal interests in this litigation, that the application here of varying state laws would impair these federal interests, and that application of federal common law would not significantly displace state law. This showing justifies application of federal common law under even the strictest reading of the sometimes enigmatic language of *Miree* and *Wallis*. If, as defendants insist, application of federal common law to mass tort claims is unprecedented, the reason may be that no tort claim has heretofore implicated such significant federal interests involving so many persons in an area so little regulated by state law. This court is satisfied that there is ample justification for application of federal common law for this legislation.

MOTION TO DISMISS OR STRIKE VARIOUS ALLEGATIONS

Defendants move to strike certain claims for relief asserted in the TAVC. Defendants argue that the claims for various forms of declaratory relief and for creation of a trust fund seek relief unavailable from a federal court under current federal law. It may well be that this or any other court ultimately will grant none of the requested relief. However, defendants are not prejudiced by allowing these requests for relief to remain in the TAVC, since defendants have no obligation to admit or deny plaintiffs' requests for relief, which therefore place no pleading burden on defendants. Accordingly, defendants' motion to strike these requests for relief is denied.

Defendants' motion to strike allegations regarding phenoxy herbicides and the corporate history of the defendants is moot, since such allegations have been omitted from the TAVC.

CONCLUSION

Defendants' motion to dismiss or strike the SAVC in whole or in part is deemed, on consent, to be directed against the TAVC. The claims in the TAVC alleged to arise, by implication, under FIFRA, FEPCA, TOSCA, and CPSA are dismissed, and defendants need not respond to paragraph 4 of the TAVC. The claims in the TAVC alleged under federal common law are held to state a claim on which relief can be granted, and to provide a basis for federal jurisdiction under 28 USC § 1331.[9] Accordingly, defendants' motion to dismiss for lack of subject matter jurisdiction is denied, as is defendants' motion to strike or dismiss various allegations of the TAVC.

Defendants shall serve and file their answers to the TAVC, which is no later than 20 days from the date of this memorandum.

Friday, December 21, 1979 at 9:30 a.m. The agenda for this conference shall include (1) a new timetable for resolution of plaintiffs' motion for class certification, and (2) a timetable for discovery on the merits. Any party may suggest other items for the agenda by letter to the court served and filed no later than Friday, December 14, 1979.

SO ORDERED.

Dated: Westbury, New York
November 20, 1979.

GEORGE C. PRATT
U. S. District Judge

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9 The parties, without arguing the point, seem to assume that application of federal common law provides a sufficient basis for federal question jurisdiction under 28 USC § 1331. This assumption is confirmed by *Illinois v. City of Milwaukee*, 406 US 91 (1972). See Wright, *Federal Courts* (3d Ed) at 68.

Opinion of the Court of Appeals
Dated November 24, 1980

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1069—September Term, 1979

(Argued May 1, 1980 Decided November 24, 1980)

Docket No. 80-7079

In re

"AGENT ORANGE"

Product Liability Litigation

Before:

FEINBERG, *Chief Judge*,
VAN GRAAFEILAND and KEARSE, *Circuit Judges*.

Appeal from an order of the United States District Court for the Eastern District of New York, George C. Pratt, *Judge*, denying defendants' motion to dismiss product liability action for lack of subject matter jurisdiction.

Reversed.

THOMAS E. MOSELEY, JOHN C. SABETTA and LEONARD RIVKIN, New York, N.Y. (Cadwalader, Wickersham & Taft, New York, N.Y., Townley & Updike, New York, N.Y., Clark, Gagliardi & Miller, White Plains, N.Y., Kelley Drye & Warren, New York, N.Y., and Rivkin, Leff & Sherman, Garden City, N.Y., on the brief) *for Defendants-Appellants.*

IRVING LIKE, Babylon, N.Y., and VICTOR JOHN YANNACONE, JR., Patchogue, N.Y. (Edward F. Hayes, III and Malerba, Abruzzo, Clancy, Hayes, Downes & Frankel, Huntington, New York, Reilly & Like, Babylon, N.Y., W. Keith Kavenagh, Bayport, N.Y., Albert J. Fiorella, Mineola, N.Y., Yannacone & Yannacone, Patchogue, N.Y., Paul F. Corcoran, Mineola, N.Y., Aaron D. Twerski, Far Rockaway, N.Y., and Dorothy Thompson and Greenwald & Greenwald, Los Angeles, Cal., on the brief) *for Plaintiffs-Appellees.*

KEARSE, *Circuit Judge:*

This appeal presents the question whether claims asserted by veterans of the United States armed forces against companies which supplied the United States government with chemicals that are alleged to have been contaminated and to have injured the veterans and their families, are governed by federal common law. Defendants-appellants Diamond Shamrock Corporation, Monsanto Company, Thompson-Hayward Chemical Company, Hercules Incorporated and the Dow Chemical Company were the manufacturers of various herbicides including "Agent Orange" (hereinafter collectively referred to as "Agent Orange") for use by the military as defoliants in the Vietnam War. The plaintiffs, veterans of that war and their families, allege that they have sustained various physical injuries by

reason of the veterans' exposure to Agent Orange. Plaintiffs seek redress of those injuries under federal common law, and have invoked the "federal question" jurisdiction of the district court. 28 U.S.C. § 1331(a) (1976). Defendants contest the existence of a federal common law cause of action, and moved below to dismiss for lack of subject matter jurisdiction. The United States District Court for the Eastern District of New York, George C. Pratt, *Judge*, denied their motion. Defendants obtained certification of the jurisdiction issue and took this appeal pursuant to 28 U.S.C. § 1292(b) (1976).[1]

We agree with defendants that there is no federal common law right of action under the circumstances of this litigation. Accordingly, we reverse.

I

The present litigation began in late 1978 and early 1979, when several individual veterans and their families commenced actions in the Northern District of Illinois and the Southern and Eastern Districts of New York, claiming injury from the veterans' exposure to Agent Orange and purporting to represent several classes of injured persons and persons allegedly "at risk" of injury. The plaintiffs in most of these actions were represented by the same attorney, who filed substantially identical complaints in all actions, naming the same defendant manufacturers. By order of the Judicial Panel on Multidistrict Litigation, thirteen such actions, involving thirty named plaintiffs, were transferred to the Eastern District of New York and assigned to Judge Pratt for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (1976). Subsequently, additional actions were filed and were transferred to the Eastern District. It appears that there are presently more than 800 named plaintiffs in these proceedings.

After the transfer plaintiffs filed an amended complaint in the action that the district court had designated as the lead

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1 This Court granted defendants' motion for leave to appeal by order dated January 16, 1980.

action for purposes of pretrial proceedings. Defendants moved to dismiss on various grounds, and by opinion dated August 14, 1979, the district court dismissed a number of claims[2] and directed that a new complaint be filed. The second amended complaint was filed on August 20, 1979, asserting causes of action under the federal common law[3] and premising subject matter jurisdiction on 28 U.S.C. § 1331(a).[4] Defendants moved to dismiss for lack of subject matter jurisdiction. The motion was argued on October 3, 1979, and after argument but prior to decision plaintiffs proffered a third amended complaint. Defendants consented to the filing of the new complaint, and the district court, at the urging of the defendants, treated defendants' motion to dismiss as having been made with respect to that complaint. Accordingly, it is the third amended complaint (hereinafter sometimes referred to as the "Complaint") that is before us on this appeal.

A. *The Third Amended Complaint*

The basic thrust of the Complaint is relatively simple: defendants manufactured a phenoxy herbicide, "Agent

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2 These included a claim for injunctive relief against further manufacture of certain herbicides (which, the district court concluded, lay within the primary jurisdiction of the Environmental Protection Agency), as well as claims asserted under 42 U.S.C. § 1983 (1976) and various provisions of the antitrust and trademark laws.

3 Plaintiffs also sought to assert a cause of action under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135 *et seq.* (1976) ("FIFRA"). The district court declined to infer such a cause of action for reasons we believe to be correct. *See* note 9 *infra*.

4 28 U.S.C. § 1331(a) provides in part as follows:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . .

A cause of action which is founded on federal common law "arises under" the laws of the United States within the meaning of § 1331(a). *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968).

Orange," for use by the military in Vietnam. The herbicide was allegedly contaminated with certain toxic organic chemicals, including 2,3,7,8-tetrachlorodibenzo-p-dioxin ("dioxin"), which plaintiffs describe as "one of the most toxic substances ever developed by man." (Plaintiffs' Brief on Appeal at 2.) The plaintiff veterans assert that they were exposed to Agent Orange, and thus to the dioxin it contained, while serving in Vietnam. They claim to have sustained various physical injuries, or to be "at risk" of such injuries, by reason of that exposure. Plaintiffs seek relief on a number of theories, including strict product liability, negligence, and breach of warranty.

What marks these proceedings as somewhat extraordinary are the size of the plaintiff class and the scope of the relief that is sought. Plaintiffs purport to represent the 2.4 million veterans who served as combat soldiers in Southeast Asia from 1962 through 1971, as well as most of the families or survivors of those veterans. Fifteen plaintiff subclasses are identified; many of these subclasses consist of persons who are "at risk" of, but have yet to sustain, various physical injuries. Plaintiffs have alleged that "the combined liquid assets of the 'corporate defendants' will be insufficient to fully compensate the entire class of plaintiffs." (Complaint ¶15.) Plaintiffs therefore seek, in addition to unspecified damages,[5] a decree requiring defendants, upon a determination of liability, to establish

> a trust fund out of the current earnings of the defendants in the nature of a reserve against the claims of all the individual members of the plaintiff class to insure that the compensation of any group of individual plaintiffs will not impair the rights of those not before the Court at that time.

(Complaint ¶9.) Plaintiffs also seek a permanent injunction against further manufacture of Agent Orange.

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5 The third amended complaint alleges no specific *ad damnum*. The second amended complaint, however, asserted damages "in the range of $4 billion to $40 billion."

Defendants deny that there is any causal connection between exposure to Agent Orange and the injuries that plaintiffs claim to have sustained, and vigorously contest the propriety of the various remedial measures that plaintiffs seek to impose on them. This case, however, is still at the pleading stage, and for purposes of deciding the jurisdictional question before us, plaintiffs' factual allegations must be accepted as true.

B. *The Decision of the District Court*

Plaintiffs argue that federal common law should be applied to their claims principally because of the unique federal nature of the relationship between the soldier and his government, relying chiefly on *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) ("Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces"). They contend that this interest brings the case within the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), which held that, in order to ensure uniformity and certainty, "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." Plaintiffs argue that the government similarly has an interest in having all of its veterans compensated by government contractors who manufactured or marketed Agent Orange, and that application of the respective state laws would impede recovery on a uniform basis.

The district court rejected the contention that *Clearfield Trust* stated the controlling principle, recognizing that the United States, a party to *Clearfield Trust*, is not party to the plaintiffs' claims here.[6] Rather, the court recognized that since the present action involves only private parties, the federal common law issue is controlled by the principles set forth in

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6 We note that the defendants have impleaded the United States in the present action. It is clear, however, that the jurisdiction of the district court over the claims of the plaintiffs is not enhanced by third party complaints. *Cf. Louisville & Nashville RR. Co. v. Mottley*, 211 U.S. 149 (1908).

Miree v. DeKalb County, 433 U.S. 25 (1977), and *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). After reviewing the latter decisions, the district court applied a three-factor test to determine whether federal common law governs plaintiffs' claims:

> (1) the existence of a substantial federal interest in the outcome of a litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal common law.

Slip op. at 17.

With respect to the first factor, the district court recognized two principal federal interests that may be affected by the present lawsuits: the federal government's interest in its relations with members of the armed forces, and its interest in its relations with suppliers of war materiel. As to the government's interest in the welfare of its veterans, the court stated that:

> Soldiers serving in the armed forces are government charges, entitled to government protection. Torts committed by war contractors against soldiers in action constitute "harms inflicted" on the soldiers and "interference" with the relationship between soldiers and the government. Such harms and interferences implicate federal interests identified in [*United States v. Standard Oil, supra*].

Id. at 18. The court rejected defendants' contention that these interests were already protected by the Congressionally-enacted scheme of veterans' benefits, 38 U.S.C. § 310 *et seq.* (1976),[7] opining that

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7 38 U.S.C. § 310 *et seq.*, entitled "Compensation for Service-Connected Disability or Death," establishes for veterans a basic entitlement to compensation from the government for injuries resulting from military service, and sets rates of compensation for specific types and degrees of disability. These provisions do not address issues of the liability of third parties to injured service personnel.

> [t]he limited nature of compensation provided by 38 U.S.C. § 310 *et seq.* makes it an insufficient guardian of the rights at stake in this litigation, *viz.* the rights of soldiers to be protected from "harms inflicted by others" and to be compensated for harms already inflicted. The existence and extent of these contested rights necessarily are intertwined with the relationship between government and soldier and thereby implicate federal interests.

Slip op. at 18-19. Finally, the court reasoned that because of the large number of veterans claiming injury, and the large potential liability of the five defendants, the foregoing federal interests were "substantial" for purposes of the federal common law analysis:

> The estimated number of involved veterans ranges from thousands to millions, and the estimated potential liability of the five war contractors ranges from millions to billions of dollars. As the number of veterans and the size of the claims against the war contractors increase so the federal interest in this litigation expands.

Id. at 20.

As to the government's interest in its relations with its military suppliers—the court referred to a number of "speculative" ways in which lawsuits such as the present ones might adversely affect that interest, pointing out that in response to any increase in their potential liability, military suppliers might raise their prices, attach conditions to the use of their products, or stop dealing with the government altogether.[8] The court concluded that

> government relations with war contractors might well be drastically altered by changes in the rules governing liability of war contractors to soldiers for injuries caused by inherently "dangerous" war materials.

Id. at 19-20.

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8 The court also noted that if defendants are eventually held liable for massive damages awards, the resulting blow to their financial health could have serious repercussions in the national economy.

Turning to the second part of its test, the court found that the federal interest it had identified would be adversely affected if the issues in these lawsuits were adjudicated under state law:

> Application of varying state laws would burden federal interests by creating uncertainty as to the rights of both veterans and war contractors. It would also be unfair in that essentially similar claims, involving veterans and war contractors identically situated in all relevant respects, would be treated differently under different state laws.

Id. at 21.

Finally, as to the third part of its test, the court determined that application of federal common law would not have any significant adverse impact on state interest. While noting that "[t]ort claims are traditionally matters for state law, which has developed comprehensive substantive and procedural rules to govern them," *id.* at 22, the court distinguished the instant tort actions, finding that

> state law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad.

Id. at 23. The court concluded:

> Because state law is no more or less developed as to such claims than federal common law, application of federal common law thereto would not significantly displace state law.

Id.

Having found substantial federal interests that would be adversely affected by application of state law to the instant claims, and having determined that there were no substantial state interests in having state law applied, the district court ruled that plaintiffs had stated valid causes of action under the federal common law.[9] The court therefore held that it had

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9 The district court correctly determined that there is no private right of action under FIFRA, 7 U.S.C. § 135 *et seq.* (1976). The current

Pub. L. No. 80-104, 62 Stat. 163 (1947) (codified at 7 U.S.C. §§ 135-135K (1976)), and the Federal Environmental Pesticide Control Act ("1972 Act"), Pub. L. No. 92-516, 86 Stat. 973 (1972) (codifed at 7 U.S.C. §§ 136-136y (1976)), which amended, and has now superseded, the original Act. *See* Pub. L. No. 92-516, § 4(b), 86 Stat. 998 (1972). Following the four-pronged analysis set forth in *Cort v. Ash*, 422 U.S. 66 (1975), we conclude that neither enactment gives rise to a private right of action.

The four factors to be considered under *Cort v. Ash* are (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted," (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," (3) whether a right of action would be "consistent with the underlying purposes of the legislative scheme," and (4) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78.

As to the original FIFRA, which was in effect during the entire period that plaintiff veterans served in Vietnam, we see no essential satisfaction of any of the *Cort v. Ash* tests. First, there is no indication that the bill was enacted for the especial benefit of military men. It is clear that Congress's intent was to protect the public in general, with perhaps some special consideration for "agricultural producers and other users" of pesticides and rodenticides. *See* [1947] U.S. Code Cong. Serv. 1200, 1202 (quoting the Report of the House of Representatives Committee on Agriculture). FIFRA makes no special mention of soldiers; and the House report, which states that the bill was considered by the United States Departments of Agriculture and the Interior, does not indicate that the bill was considered by any military or defense agency. *Id.* As to the second (and most important, *see Leist v. Simplot*, No. 79-7402, -7464, -7482 (2d Cir. July 8, 1980)) of the *Cort* factors, we see no clear indication of legislative intent to create a private remedy. Plaintiffs have cited no legislative history on this point, nor have they presented any detailed statutory analysis. The Act itself is primarily concerned with establishing an administrative scheme of labeling, registration and enforcement; there are indications that Congress expected that scheme to be the exclusive means of enforcement. *See* [1947] U.S. Code Cong. Serv. *supra*, at 1202. We conclude that this factor cuts against the plaintiffs. The third *Cort* factor is of little assistance here. While a private right of action might enhance enforcement of the Act's substantive provisions to some extent, it would also increase the burden on manufacturers (without commensurately increasing protection of *injured* persons who can recover damages under state product liability law), something which the administrative scheme of registration was specifically intended to avoid. *See* [1947] U.S. Code Cong. Serv., *supra* at 1202. Finally, the fourth *Cort* factor cuts strongly against the plaintiffs. The area of product liability has been "traditionally relegated to state law," and this is no less true of the products regulated by the FIFRA. *See, e.g., Muncy v. Magnolia*

subject matter jurisdiction over the case, and denied defendants' motion to dismiss.[10] This appeal followed.

Chemical Co., 437 S.W.2d 15 (Tex. Civ. App. 1968). Thus, we conclude that the district court was correct in ruling that there is no private right of action under the original FIFRA.

As to the 1972 Act, the unavailability of a private right of action is even clearer. We find no more positive indications in the first, third and fourth *Cort* factors. More importantly, we find a negative indication as to the second *Cort* factor, *i.e.*, legislative intent, since Congress considered and explicitly rejected amendments that would have authorized citizen suits to enforce the 1972 Act's prohibitions. *See People for Environmental Progress v. Leisz*, 373 F. Supp. 589, 592 (C.D. Cal. 1974) (discussing legislative history); *see also Kelly v. Butz*, 404 F. Supp. 925, 940 (W.D. Mich. 1975). It is not for us to override that Congressional determination.

10 The court also denied defendants' motion to strike portions of the Complaint relating to plaintiffs' demand that defendants be required to establish a trust fund. The court premised the denial on its conclusion that

> defendants are not prejudiced by allowing these requests for relief to remain in the [Complaint], since defendants have no obligation to admit or deny plaintiffs' requests for relief, which therefore place no pleading burden on defendants.

Slip op. at 24. In addition, it appears that the court declined to rule on a motion to strike portions of the Complaint relating to class members who have not yet been injured, but are said to be merely "at risk" of injury by reason of a veteran's exposure to Agent Orange. Defendants argue here, as they have in moving for reargument below, that the district court should have granted both motions to strike. We decline to reach these questions. The district court, in granting certification under § 1292(b) was primarily concerned with the question of subject matter jurisdiction; the certification mentions only that issue. While we are not restricted by the district court's limited certification, *see Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 994-95 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), and may review the entire order of the court below, *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 660 (2d Cir. 1974), we conclude that review now of the trust fund and "at risk" issues would be inappropriate. First, our ruling on subject matter jurisdiction may end the federal court litigation. (It is unclear whether any plaintiffs will seek to proceed on the basis of diversity jurisdiction.) More importantly, the district judge did not assess the merits of either motion to strike, and we note that he has reserved decision on defendants' motion for reargument of these questions, pending decision of this Court on the question of jurisdiction. In all, we think the wiser course is for this Court not to pass on them at this time.

II

Both plaintiffs and defendants accept the three-part test that the district court applied to the federal common law issue, and for purposes of discussion we accept that framework. But, focusing our consideration chiefly on the first factor of the test, *i.e.*, "the existence of a substantial federal interest in the outcome of the litigation," we disagree with the district court's analysis and conclude that the court gave insufficient weight to the Supreme Court's repeated admonition that

> [i]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.* . . .

Wallis v. Pan American Petroleum Corp., supra, 384 U.S. at 68, *quoted with emphasis in Miree v. DeKalb County, supra,* 433 U.S. at 31. Principally we reject the district court's conclusion that there is an identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules.[11]

In considering plaintiffs' contentions, it is essential to delineate precisely the relation of the United States to the claims here at issue. These claims are brought by former servicemen and their families against private manufacturers; they are not asserted by or against the United States, and they do not directly implicate the rights and duties of the United States. They are thus unlike the claims in *United States v. Standard Oil Co., supra,* in which the government brought suit to recover for its payments to a soldier injured as a result of the defendant's negligence, and *Clearfield Trust Co. v. United States, supra,* in which the government brought suit to enforce

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11 Since we conclude that there is not now an identifiable federal policy, we need not reach the second and third factors of the test and speculate as to how state law, if it were already developed, would affect the federal policy if it were identifiable—or vice versa.

its rights in commercial paper issued by it. In each of those cases the government was a party seeking to enforce its own asserted rights, and analysis reveals two federal concerns which are inherent in such cases. First, the government has an interest in having uniform rules govern its rights and obligations. Second, the government has a substantive interest in the contents of those uniform rules. The first interest prizes uniformity for its own sake and is content-neutral; it does not dictate the substance of the federal common law rule to be applied. Thus, in *United States v. Standard Oil Co., supra,* the Court applied federal common law, recognizing the government's interest in uniformity, but refused to impose the liability argued for by the United States as the substance of that law.

The present litigation is fundamentally different from *Standard Oil* and *Clearfield Trust* with respect to both uniformity interest and substantive interest in the content of the rules to be applied. Since this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest in uniformity for its own sake.[12] *See e.g., Miree v. DeKalb County, supra,* 433 U.S. at 28. The fact that application of state law may produce a variety of results is of no moment. It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens. That alone is not grounds in private litigation for judicially creating an overriding federal law. Indeed, even where a federal statutory program governs the rights of private litigants and Congress has left gaps to be filled by the courts, uniformity is not prized for its own sake. For example, in *Auto Workers v. Hoosier Corp.,* 383 U.S. 696, 701-05 (1966), the Court dealt with a suit under § 301 of the

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12 *Compare Bank of America Nat'l Trust & Sav. Ass'n v. Parnell,* 352 U.S. 29, 32-34 (1956), private litigation involving the issues of whether certain government bonds were "overdue" and whether the defendant had taken title to the bonds in good faith. The Court observed that the question of when a government bond is overdue is a matter of federal law, but held that questions as to a party's good faith are left to local law.

National Labor Relations Act, 29 U.S.C. § 185 (1976), to which federal common law applied. Yet in determining the timeliness of such suits, the Court ruled that the appropriate state statutes of limitations should apply, and refused to impose a uniform federal period of limitations:

> [T]imeliness . . . is clearly a federal question, for in § 301 suits the applicable law is "federal law, which the courts must fashion from the policy of our national labor laws," *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456. . . . We are urged instead [of referring to state laws,] to devise a uniform time limitation to close the statutory gap left by Congress. But the teaching of our cases does not require so bald a form of judicial innovation.

Id. at 701. Thus, the prospect of uniformity is insufficient reason to invoke federal common law in private litigation; and if federal common law were invoked, it would not ensure uniformity since frequently that law takes its substance from local law.

The second fundamental difference between the present litigation and the *Clearfield Trust* type of case is that in the latter, the government's substantive interest in the litigation is essentially monothetic, in that it is concerned only with preserving the federal fisc, whereas here the government has two interests; and here the two interests have been placed in sharp contrast with one another. Thus, the government has an interest in the welfare of its veterans; they have given of themselves in the most fundamental way possible in the national interest. But the government also has an interest in the suppliers of its materiel; imposition, for example, of strict liability as contended for by plaintiffs would affect the government's ability to procure materiel without the exaction of significantly higher prices, or the attachment of onerous conditions, or the demand of indemnification or the like. As plaintiffs' counsel has observed, "this litigation will have a direct and lasting impact on the relationship between the federal government and war contractors . . . and between the federal government and veterans." (Letter dated October 21, 1980, V. J. Yannacone, Jr.

to A. D. Fusaro.) It is obvious that the government is interested. But unlike a simple uniformity interest, neither the government's interest in its veterans nor its interest in its suppliers is content-neutral. Each interest will be furthered only if the federal rule of law to be applied favors that particular group.

The extent to which either group *should* be favored, and its welfare deemed "paramount" (see dissent of Chief Judge Feinberg, *post*), is preeminently a policy determination of the sort reserved in the first instance for Congress. The welfare of veterans and that of military suppliers are clearly federal concerns which Congress should appropriately consider in setting policy for the governance of the nation, and it is properly left to Congress in the first instance to strike the balance between the conflicting interests of the veterans and the contractors, and thereby identify federal policy. Although Congress has turned its attention to the Agent Orange problem,[13] it has not determined what the federal policy is with respect to the reconciliation of these two competing interests. Thus, this case is unlike *Owens v. Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 940 (1979), or *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968), in which the court was asked to supplement with federal common law a federal statutory program which itself embodied Congressional policy determinations.[14] In *Owens*, as Chief Judge Feinberg observes, *post*, the Court "discerned a

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13 Congress has directed the Administrator of Veterans' Affairs to design and conduct an epidemiological study of veterans who were exposed to Agent Orange, and to report periodically to Congress until the study is completed. *See* Pub. L. No. 96-151, 96th Cong., 1st Sess. (1979); 38 U.S.C. § 219 note (Supp. 1980).

14 Plaintiffs contend that FIFRA (*see* note 9 *supra*) evinces a federal interest in regulation of herbicides sufficient to call into play the federal common law. But as this court has noted, FIFRA was not intended to preempt state law even with respect to those matters it specifically regulates. *Chemical Specialties Mfrs. Ass'n v. Lowery*, 452 F.2d 431 (2d Cir. 1971). It is certainly an insufficient basis for a displacement of the entire body of state product liability law.

'federal regulatory scheme' " for the protection of prisoners. It is one thing to *discern* a federal regulatory scheme from the statutes Congress has enacted, as in *Owens*; it is another to *devise* such a scheme in the face of inaction by Congress. The dissent finds it anomalous that federal common law may apply to prisoners but not to veterans. We suggest that the anomaly lies not with the court in declining to devise a scheme, but with Congress which has made specific provision for protection of the government's prisoners but not for its soldiers.

We conclude that in the present case, while the federal government has obvious interests in the welfare of the parties to the litigation, its interest in the *outcome* of the litigation, *i.e.*, in how the parties' welfares should be balanced, is as yet undetermined.[15] The teaching of *Wallis* and *Miree* is that before federal common law rules should be fashioned, the use of state law must pose a threat to an "identifiable" federal policy. *Wallis v. Pan American Petroleum Corp., supra* at 68; *Miree v. DeKalb County, supra* at 31-33. In the present litigation the federal policy is not yet identifiable. We conclude, therefore, that the district court erred in ruling that plaintiffs' claims were governed by federal common law. The order denying defendants' motion to dismiss for lack of subject matter jurisdiction is accordingly

Reversed.

FEINBERG, *Chief Judge* (dissenting):

This case presents us with a unique set of facts, parties, and pleadings. Many aspects of plaintiffs' case are troublesome, because plaintiffs seek unusual relief, both procedural and substantive, as to which I express no view. But the issue now before us is far narrower, and raises more familiar considera-

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15 The large number of veterans claimed in the class does not reveal the content of a federal policy reconciling the competing interests, any more than does the possibility that the defendant companies would have to be liquidated to pay the claims of the class.

tions. That issue is whether a federal district court has federal question jurisdiction over the action, see 28 U.S.C. § 1331(a), because the action arises under federal common law. I agree with District Judge Pratt that this case should be tried in federal court under rules of federal common law. I therefore dissent from the opinion of the majority.

That the present case is *sui generis*, and national in its proportions, is evident from the complaint itself. The defendants in this action are five of the largest chemical companies in the nation, all of which admittedly manufactured "Agent Orange," a defoliant, for use by our nation's armed forces in Vietnam between 1962 and 1971. Plaintiffs' suit is brought on behalf of veterans, living and dead, and their parents, wives, widows, orphans, and children, living, dead, and stillborn. Plaintiffs allege that the Agent Orange supplied by the defendants was "contaminated with . . . polychlorinated dibenzo-*p*-dioxins . . . and polychlorinated dibenzo furans . . . including 2,3,7,8,-tetra-chloro dibenzo *p*-dioxin (. . . "Dioxin"), one of the most toxic substances ever developed by man." Plaintiffs further allege that as a result of exposure to Agent Orange, they incurred, or have suffered an increased risk of incurring, cancer, genetic damage, and an early death. Judge Pratt noted that the defendants are "facing aggregate claims which may eventually amount to billions of dollars." As the majority notes, the complaint identifies fifteen groups of plaintiffs, totalling over 800 plaintiffs who, we are told, have filed complaints in 25 judicial districts all across the country. By this time it is probable that 30 to 40 districts are affected, since additional plaintiffs appear daily; plaintiffs' counsel assures us that many more complaints would already have been filed, but for the request of Judge Pratt not to do so until the question of class certification has been resolved. How many plaintiffs will ultimately come forward is unclear. Present plaintiffs assert that as many as 2,400,000 men and women who served in the armed forces could be eligible to sue defendants—not to mention their parents, dependents, and dead or stillborn children. The national dimensions of the case as pleaded are too obvious to escape notice. Identical com-

plaints have been filed, *inter alia*, in Massachusetts and California, in Illinois and Texas, and we are informed that the Judicial Panel on Multidistrict Litigation has ordered all Agent Orange cases consolidated before Judge Pratt. The plaintiffs in these cases complain of injuries sustained as the result of service in our nation's military, in a national endeavor in a foreign land. To the non-legal mind, it would be an odd proposition indeed that this litigation, so patently of national scope and concern, should not be tried in federal court.

As for the legal mind, all involved in this case—the parties, Judge Pratt, and the panel on appeal—appear to agree that federal question jurisdiction depends upon whether a federal common law rule of product liability should be applied. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-101 (1972); *Ivy Broadcasting Company v. American Telephone and Telegraph Company*, 391 F.2d 486, 492-93 (2d Cir. 1968). Whether a federal rule should be applied, in turn, depends on three factors, as discerned in *Miree v. DeKalb County*, 433 U.S. 25 (1977), and *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63 (1966):

> (1) the existence of a substantial federal interest in the outcome of the litigation;
>
> (2) the effect on this federal interest should state law be applied; and
>
> (3) the effect on state interests should state law be displaced by federal common law.

Judge Pratt, in his thorough and able opinion, analyzed all these factors and concluded that the fashioning of a federal common law rule was warranted on the facts of the present case. In a closely analogous case, *Owens v. Haas*, 601 F.2d 1242 (2d Cir.), cert. denied, 444 U.S. 980 (1979), this court recently arrived at the same result. *Owens* is instructive because it represents the most recent examination by this court of the "federal interest" doctrine discussed in *Miree* and *Wallis*. A review of the *Owens* facts and holding shows that Judge Pratt's analysis of the factors set forth above was correct.

In *Owens*, plaintiff was a federal prisoner who was injured by county jail officials who were working under contract with the federal government. Plaintiff sued for damages as, *inter alia*, a third-party beneficiary of that contract. On that theory, the "first question" before this court was whether plaintiff's claims were "a matter of federal law or of state law"; the question was posed "both as a guide to contract interpretation and as an alternate basis for jurisdiction in the district court." 601 F.2d at 1248. Writing for the panel, the late Judge Smith noted that "the federal government owes a duty of reasonable care to safeguard the security of prisoners under its control," and discerned a "federal regulatory scheme" for maintaining the health and well-being of such prisoners. *Id.* at 1249. Judge Smith then concluded that this regulatory scheme generated "a federal interest in assuring uniform treatment of federal prisoners," *id.*, and that that interest, combined with the government's duty of reasonable care, meant that "federal rights and obligations [did] 'hinge on the outcome' of litigation in this area," *id.* at 1249-50. As a result, the court held that federal common law should apply.

Looking, as the *Owens* court did, to *Miree* and *Wallis*, the first question we must answer is whether the federal government has a "substantial interest" in the outcome of this litigation. It is plain that this question must be answered affirmatively. As the Supreme Court observed in *United States v. Standard Oil Company*, 332 U.S. 301 (1947),

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or non-federal governmental agencies, the scope, nature, legal incidents and consequences of the relations between persons in service and the government are fundamentally derived from federal sources and governed by federal authority. See *Tarble's Case*, 13 Wall. 397; *Kurtz v. Moffitt*, 115 U.S. 487. So also we think are interfer-

> ences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.

Id. at 305-06 (footnotes omitted). This obviously federal relationship does not depend primarily upon any particular statute, but rather inheres in the federal government's exclusive capacity to wage war. But in the case before us this relationship can also be analyzed in terms of *Owens*. In *Owens*, the federal government was found to owe "a duty of reasonable care" to federal prisoners, a duty stemming from statutory enactment, specifically 18 U.S.C. § 4042.[1] Similarly, the federal government here is under a statutory obligation to provide "an improved and uniform program of medical . . . care for members [of the uniformed services] and certain former members of those services, and for their dependents." 10 U.S.C. § 1071. Further, in *Owens* this court discerned in "the scheme of regulation of federal prisons [an indication of] congressional intent to provide some general protections for federal prisoners." 601 F.2d at 1249. Similarly, in the present case there is a statutory scheme to provide "general protections" for members and veterans of the uniformed services. See 10 U.S.C. §§ 1071-87 (program of medical care for members of uniformed services and dependents); 38 U.S.C. §§ 310-15 (schedule of compensation to veterans and dependents for wartime disabilities); §§ 321-22 (schedule of compensation to survivors of veterans for wartime death); §§ 331-35 (same, peacetime disabilities); §§ 341-42 (same, peacetime death); 50 U.S.C. § 45(a) (requiring adequate provision of shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations before

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1 18 U.S.C. § 4042 provides, in pertinent part, that the "Bureau of Prisons . . . shall . . . provide for the safekeeping, care, . . . subsistence, . . . [and] protection . . . of all persons charged with or convicted of offenses against the United States . . . ."

persons can be inducted into military service). See also the various regulations governing the welfare of soldiers, all of which are, of course, promulgated under authority granted by Congress. 10 U.S.C. § 121 (President's power to prescribe regulations); § 3012(g) (Secretary of Army's power to prescribe regulations).[2] The Secretary of the Army is required by statute to be responsible for the "welfare, preparedness, and effectiveness of the Army." 10 U.S.C. § 3012(b)(1).

The majority concludes that on the facts of this case "there is no federal interest in uniformity for its own sake," and that there is no federal "substantive interest in the content of the rules to be applied." I disagree on both counts. As to uniformity of treatment, this court noted in *Owens* that "[b]ecause there is a federal regulatory scheme, there is a federal interest in assuring uniform treatment of federal prisoners." 601 F.2d at 1249. It is anomalous for this court to hold, on the one hand, that the federal government has an interest in "uniform treatment" of its *prisoners* sufficient to warrant the use of a federal rule of recovery, and, on the other hand, that the federal government has no such interest in "uniform treatment" of its *soldiers*. The majority suggests that the anomaly here lies "with Congress, which has made specific provisions for the protection of the government's prisoners but not for its

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2 E.g., Army Regulation 40-2, Army Medical Treatment Facilities, General Administration (effective April 1, 1978) (requiring provision of highest quality of patient care to soldiers in Army medical facilities); Army Regulation 40-3, Medical, Dental, and Veterinary Care (effective December 1, 1977) (providing standards of policy, eligibility, treatment, and administration, inter alia, in Army medical facilities); Army Regulation 32-15, Clothing and Textile Materiel, Classification and Inspection (effective October 1, 1976) (providing minimal standards for serviceability of clothing of Army personnel); Army Regulation 210-16, Bachelor Housing Management (effective September 15, 1975) (providing minimal standards of adequacy for quarters of certain Army personnel); Army Regulation 30-1, Army Food Service Program (effective July 1, 1977), (providing standards for food and food services for Army personnel); Army Regulation 28-1, Army Morale Support Activities (effective February 15, 1979) (providing programs for maintenance of morale, esprit, mental and physical fitness, and combat readiness of Army personnel).

soldiers." But a review of the statutory and regulatory provisions cited above, especially 10 U.S.C. §§ 1071-87 (medical care), § 3012(b)(1) (Secretary of Army's responsibility for "welfare" of Army personnel), and 38 U.S.C. §§ 310-15, 321-22, 331-35, 341-42 (veterans' and survivors' compensation), as well as myriad, detailed Army Regulations, demonstrates beyond doubt that Congress has made specific provisions for the protection of its soldiers, both directly and by delegation.

The majority also concludes that because the government has arguably conflicting substantive interests in the outcome of the litigation, "the federal policy is not yet identifiable." The allegedly conflicting federal interests are in the welfare of veterans and in the welfare of suppliers of war materiel. But that the plaintiff veterans and the defendant contractors have opposing interests in this litigation hardly means that the paramount federal interest is somehow divided or self-contradictory. The United States has a clear interest in the protection of its soldiers from harm caused by defective war materiel. What other interests does the United States arguably have that might conflict with this clear interest? One such interest might be in seeing that defendants, as suppliers of war materiel, are treated fairly. But that interest cannot be said to conflict with the government's interest in the safety of its soldiers. Another such interest might be in preventing defendants from being driven to bankruptcy by large damage awards to Agent Orange plaintiffs, who have already made claims assertedly greater than defendants' combined liquid assets. This, I take it, is what the majority means by its reference to the federal interest in the "welfare" of defendants. But this interest lies in the future, and in the realm of speculation. There will be time enough to deal with the potential impact of defendants' financial liability if and when they incur any, if it is truly in the interest of the United States to do so. By contrast, plaintiffs' injuries—assuming for the moment that plaintiffs have a viable cause of action—lie in large part in the present, and in the realm of the concrete. The conclusion seems inescapable to me that the United States' interest in the "welfare" of defendants cannot

approach, either in magnitude or in quality, its interest in the welfare of the Agent Orange plaintiffs. In short, in the case before us the paramount interests of the United States are in the welfare of its veterans and in their fair and uniform treatment.

Having discerned a significant federal interest, we are next required to determine whether or not a "significant conflict" exists between that interest and the application of state law. This factor is not reached by the majority. But that such a conflict does exist in the present case can hardly be disputed. Given the "distinctively federal" character of the relationship between the federal government and its soldiers, there is an inherent federal interest in the uniform definition of the aspects of that relationship involved in this case. As noted earlier, this inherent interest in uniformity was observed by this court in *Owens*, 601 F.2d at 1249. The application of state law to the present case would severely frustrate this federal interest: If state law is applied in the present litigation, and assuming again that the allegations in the complaint are true, then veterans may well be subjected to sharply differing rules of law in the pursuit of their remedies. For example, the law of the various states is in flux, diverging widely in the definition of what constitutes a "defective" product—especially with respect to defectively designed products—and in the availability of defenses based on the "state of the art" and technological feasibility. See United States Department of Commerce, Interagency Task Force on Product Liability, Product Liability: Final Report II-6-10 (1977) (varying state law respecting "defectiveness," especially in design-defect cases); *id.* at II-11-12 (same, respecting defense of "state of the art"). As a result, if the laws of 30 or 40 state jurisdictions are separately applied, veterans' recoveries for Agent Orange injuries will vary widely—despite the fact that these soldiers fought shoulder to shoulder, without regard to state citizenship, in a national endeavor abroad. In sum, the federal interest here in uniformity would be defeated by the application of discrete and differing state laws. It is thus not necessary to reach the question whether the other federal interest present in this

case—in seeing that soldiers are not harmed by defective war materiel—would be frustrated by the application of state law. Because the federal interest in uniformity would be defeated by such an application, I conclude that the first two requirements of *Miree* and *Wallis*, as interpreted by this court in *Owens*, are satisfied, as Judge Pratt concluded.

The third and last factor involves the extent to which state interests would be affected, if state law were to be "displaced" by federal common law in the present case. This factor is also not reached by the majority. I agree with Judge Pratt's conclusion that the claims made by plaintiffs in this unique and unprecedented litigation do not fall within the developed area of state tort law. As noted above, the states' product liability law is in flux; with respect to a case as novel as the one before us, a consistent and established body of state law is even less discernible. Accordingly, I think that Judge Pratt was correct in holding that the application of federal common law to the case before us would not "displace" state law, because there is no substantial body of state law on this point to be displaced. I thus conclude that all three factors, accepted by the majority as the proper analytical framework, point to the use of a federal common law rule in the present case, giving rise to federal question jurisdiction.

Because I conclude that the district court does have jurisdiction over the case before us, I dissent from the opinion of the majority.

Order of the Court of Appeals
Dated January 28, 1981

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of January, one thousand nine hundred and eighty-one.

No. 80-7079

In re

"AGENT ORANGE"

Product Liability Litigation

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Chief Judge Feinberg dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the

appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
A. Daniel Fusaro,
Clerk

United States Court of Appeals
Second Circuit
Filed January 28, 1981
A. Daniel Fusaro, *Clerk*

Order of the Court of Appeals Dated February 6, 1981 Granting Motion for Stay Without Bond

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7079

In re

"AGENT ORANGE"

Product Liability Litigation

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

WILFRED FEINBERG
ELLSWORTH A. VAN GRAAFEILAND
(Signature Illegible)
Circuit Judges

Date: 2/6/81